

SERVICE DATE - LATE RELEASE MARCH 14, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34662

CSX TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER

Decided: March 14, 2005

In this proceeding, CSX Transportation, Inc. (CSXT) has petitioned the Board for an order declaring that the “Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005” (the D.C. Act), which seeks to govern the transportation of hazardous materials moving by rail through the District of Columbia (District or D.C.), is federally preempted pursuant to 49 U.S.C. 10501(b).¹ On February 8, 2005, the Board issued a decision inviting the District and other interested persons to file comments on CSXT’s petition by February 16, 2005. The District and the Sierra Club submitted replies opposing the petition. Comments in support of CSXT’s petition were filed by the United States Department of Transportation (U.S. DOT), the Association of American Railroads, other railroad interests,² shippers, including producers and users of hazardous materials,³ and Members of Congress.⁴ Subsequent to the filing of this

¹ That provision is often referred to as “section 10501(b) preemption” or as “ICCTA preemption,” as it was broadened by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1995).

² Norfolk Southern Railway Company; Paducah & Louisville Railway, Inc.; RailAmerica, Inc.; Railway Supply Institute, Inc. (the international trade association of the rail and rail rapid transit supply industry); and Watco Companies, Inc. (a holding company for 10 Class III railroads).

³ American Chemistry Council; BASF Corporation; Celanese Chemicals, Ltd.; CF Industries, Inc.; Council on Radionuclides and Radiopharmaceuticals, Inc.; Dakota Gasification Company; Degussa Corporation; DSM Chemicals North America, Inc.; Edison Electric Institute; The Fertilizer Institute; Industrial Resources Group, Inc.; Jones-Hamilton Co.; LaRoche Industries, Inc.; National Industrial Transportation League; National Mining Association; NOVA Chemicals, Inc.; Olin Corporation; R.W. Griffin Feed, Seed, & Fertilizer, Inc.; Southern States Chemical, Inc.; The Sulfur Institute; and Sulfur Products Mutual Assistance Response Team (an unincorporated association representing producers and distributors of sulfur dioxide, sulfuric acid, oleum, and related sulfur products).

⁴ Congresswoman Corrine Brown, Congressman Tom Davis and Congressman Steven C. LaTourette.

petition, CSXT filed a petition in the United States District Court for the District of Columbia,⁵ seeking to have the D.C. Act declared invalid, and has sought a preliminary injunction from the court to enjoin enforcement of the D.C. Act. A briefing schedule in that case has been set, and a hearing is scheduled for March 23, 2005.

We have carefully considered CSXT's petition and all of the replies, and for the reasons discussed below, we are granting CSXT's petition and issuing a declaratory order. Although other Federal agencies — U.S. DOT and the Department of Homeland Security (DHS) — also have jurisdiction over aspects of the movement of hazardous materials by rail, the discussion herein is limited to the preemptive effect of the statute that the Board administers. In the Board's view, section 10501(b) preempts the D.C. Act.

BACKGROUND

A. The D.C. Act

On February 1, 2005, the D.C. City Council passed the D.C. Act, which the Mayor signed on February 15, 2005. The D.C. Act would ban transportation of certain classes of hazardous commodities (including explosives, flammable gasses, poisonous gasses and other poisonous materials) within a 2.2-mile radius of the United States Capitol Building (the "Capitol Exclusion Zone") without a permit from the D.C. Department of Transportation (D.C. DOT). The D.C. Act also would ban the movement within that area of any rail car⁶ that is "capable of containing" such materials, thereby precluding the movement of empty hazardous materials rail cars within the Capitol Exclusion Zone without a permit from D.C. DOT. The D.C. Act provides for D.C. DOT to issue a permit for the movement of otherwise-banned commodities only if a carrier can demonstrate "that there is no practical alternative route" for the traffic.

B. CSXT's Petition

On February 7, 2005, CSXT filed a petition seeking a Board order declaring that the D.C. Act is preempted by section 10501(b). To prevent disruption to CSXT's rail service, CSXT requested that we grant expedited handling of this petition and act on its merits as soon as possible.

CSXT takes the position that the D.C. Act unreasonably burdens interstate commerce. CSXT states that enforcement of the D.C. Act could encourage other local jurisdictions to enact

⁵ CSXT Transp., Inc. v. Williams, No. 1:05CV00338 (D.D.C. filed Feb. 16, 2005).

⁶ The ban also applies to motor vehicles, but that part of the D.C. Act is not at issue in this proceeding.

similar measures, and that the more extensive rerouting that would be needed to comply with the D.C. Act would merely transfer the risks associated with the transportation of hazardous materials to other cities and communities.

CSXT trains operating through the District contain both loaded cars containing hazardous materials and empty return movements of such cars. None of these movements originate or terminate within the District, and they are all interstate movements. CSXT notes that it must accept shipments of hazardous materials as part of its common carrier obligation to serve shippers upon request pursuant to 49 U.S.C. 11101(a).

The carrier further notes that a comprehensive scheme of federal regulation by U.S. DOT governs these movements. See generally, CSX Transp. Inc. v. The Public Utilities Comm'n of Ohio, 901 F.2d 497 (6th Cir. 1990); Consolidated Rail Corp. v. ICC, 646 F.2d 642, 648-49 (D.C. Cir. 1981). The regulations adopted by U.S. DOT's Research and Special Programs Administration (RSPA) pursuant to the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 5013 et seq., impose specific requirements for movement of hazardous materials. See 49 CFR Parts 171-180. The Federal Railroad Administration (FRA), has primary responsibility pursuant to the Federal Rail Safety Act (FRSA), 49 U.S.C. 20101 et seq., for matters involving safety of railroad operations, regulates railroad operations, including train speed, track and road bed conditions, signal systems, brake system standards, hours of service requirements for railroad employees, operating practices, and drug and alcohol testing for railroad employees. See 49 CFR Parts 200-268. FRA also has promulgated comprehensive track safety standards, which prescribe, among other things, maintenance and inspection requirements and maximum speeds for track, and can restrict, where necessary for safety, the movement of hazardous materials. 49 CFR Part 213.

The railroad states that, following the terrorist attacks of September 11, 2001, CSXT worked with FRA and the Transportation Security Administration (TSA) (now part of DHS) to develop a specific security plan for the transportation of hazardous materials that was reviewed and approved by both of those agencies. In 2004, TSA undertook a comprehensive vulnerability assessment of CSXT's rail routes through the District, and CSXT is in the process of implementing certain enhanced security measures recommended by TSA. Neither TSA nor any other federal agency has directed CSXT to reroute cars of hazardous commodities away from the District altogether.

CSXT has two lines that pass through the District: CSXT's north-south main line (the I-95 Route) that runs from Jacksonville, FL, to Boston, MA, and its east-west main line (the East-West Route) from Washington, D.C., via Maryland and West Virginia, to Chicago, IL, and St. Louis, MO. In the Spring of 2004, CSXT, in consultation with federal officials, began voluntarily rerouting loaded cars carrying hazardous materials so that such cars no longer move over the I-95 Route through the District — the route that runs in close proximity to the Capitol. But the East-West Route, which is not near the Capitol, was not affected and continues to be

used by CSXT for such traffic. Also, CSXT's voluntary rerouting does not apply to the movement of empty cars.

CSXT explains that the more extensive rerouting required by the D.C. Act would affect rail service around the country. According to CSXT, to avoid the District would in many cases add hundreds of miles and days of transit time to hazardous materials shipments. CSXT handles hazardous materials shipments in trains that also handle other traffic, and, accordingly, would have to delay trains at rail yards outside the District so that cars containing any of the commodities covered by the D.C. Act could be removed from the trains prior to entering the District. CSXT asserts that the additional switching operations and intermediate car handlings, and increases in the amount of dwell time spent in yards en route for cars handling hazardous materials, would add to congestion in rail yards already operating at or near capacity, could back up freight traffic on CSXT's main lines, and potentially could affect rail commuter and intercity passenger services operated over CSXT's lines in the metropolitan Washington area.

C. Replies in Opposition

In its February 16, 2005 reply, the District argues that CSXT's petition should be denied on the merits. The District maintains that its law was enacted to protect its citizens from a potential terrorist attack on a train (or truck) carrying hazardous materials, and therefore is an exercise of the District's police powers that is not preempted by section 10501(b). It also claims that section 10501(b) does not preempt the D.C. Act because the D.C. Act does not constitute direct economic regulation of railroads. The District suggests that its action may be protected from challenge under the doctrine of sovereign immunity.

The Fiscal Impact Statement attached to the enrolled original of the D.C. Act provides that "[t]he primary impact of the legislation is to regulate the transport of hazardous materials by private organizations." Similarly, D.C. Council Members Patterson and Mendelson stated in a memorandum to D.C. Council members dated January 26, 2005, at 1, that the Act would "effectively prevent the through shipment of [hazardous materials] by rail or truck, thereby removing the risk and threat to our citizens."

Nevertheless, the District now maintains that the D.C. Act does not unreasonably burden interstate commerce. It contends that a provision of the D.C. Act that allows shipments to move if there is no practical alternative route and CSXT obtains a permit from D.C. DOT means that the Act is not a blanket prohibition of interstate commerce.

The District also argues that the Board does not have primary jurisdiction because FRA has primary responsibility for rail safety and DHS has primary jurisdiction over rail security. It contends that neither FRA nor DHS has adopted any regulations regarding the security concerns relating to the routing of hazardous materials movements, and therefore the District is free to adopt its own.

Sierra Club also opposes CSXT's petition. Sierra Club argues that the Board has no authority to address the D.C. Act because it does not constitute economic regulation. Sierra Club claims that CSXT's commerce clause arguments, as well as the carrier's preemption arguments related to the FRSA and the HMTA, should be addressed to the agencies that administer those statutes or to a federal district court.

Both Sierra Club and the District suggest that, if the Board addresses CSXT's request on the merits, further evidentiary proceedings should be conducted first.

D. Replies in Support

In comments supporting CSXT's petition, U.S. DOT presents its statutory analysis that interstate rail transportation is subject to overlapping regulatory oversight by three federal agencies—U.S. DOT, DHS, and the Board—and that, “[w]orking individually within their respective jurisdictions each has the complete authority to preempt non-Federal laws that undermine national rail uniformity” (comments at 5). U.S. DOT states that it has concluded that the D.C. Act is preempted by its safety regime under the FRSA and the HMTA, and that it interferes impermissibly with CSXT's routing decisions. Therefore, it urges the Board to find the D.C. Act to be preempted pursuant to section 10501(b), as well. U.S. DOT comments at 14.

The other commenters supporting CSXT's petition concur in CSXT's argument that the D.C. Act is preempted by section 10501(b). The commenters express concern that, if the District were successful in imposing such a restriction on interstate commerce, other municipalities would be encouraged to enact similar measures regarding when and where particular products could be carried, thereby disrupting commerce by rail throughout the country. The commenters recognize the public's concerns about hazardous materials transportation, but argue that local measures to force rerouting of hazardous materials shipments by rail could foreclose transportation routes and operations that are optimal in terms of overall safety, security, and efficiency.

DISCUSSION AND CONCLUSIONS

Although the Board does not have the power to invalidate the D.C. Act, the Board has discretion to grant a request for a declaratory order. Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty in a case that relates to the subject matter jurisdiction of the Board. The Board has broad discretion to determine whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). In this case, the Board will grant CSXT's petition and issue a declaratory order concluding that the D.C. Act is preempted by section 10501(b).

Before addressing the scope of section 10501(b), we will address certain preliminary matters. First, our decision here addresses only the preemptive effect of section 10501(b). The preemptive effect of other statutes is more properly addressed by the agencies that administer those statutes, and by the federal district court. Similarly, claims arising pursuant to the Constitution are also more properly addressed by the court.

Second, the District has suggested that it might require discovery in this proceeding to explore CSXT's factual allegations and that it should be permitted to present further evidence on the risks of terrorist attacks. In this connection, we do not make any factual findings in this decision. The issue presented here is a legal one, and the record before us provides the information we need to reach our conclusion. Therefore, neither discovery nor further evidentiary proceedings are necessary. See Consolidated Rail Corp.—Declaratory Order Proceeding, STB Docket No. 34319, slip op. at 7 (STB served Oct. 10, 2003).

Third, the District suggests that relief is barred here by the doctrine of sovereign immunity. But sovereign immunity does not preclude the issuance of a decision analyzing controlling federal law. See Dakota, Minn. & E.R.R. v. South Dakota, 362 F.3d 512, 517 (8th Cir. 2004), citing Verizon Md. Inc. v. Public Serv. Comm'n, 535 U.S. 635, 645 (2002); Duke Energy Trading & Mktg. v. Davis, 267 F.3d 1042, 1053-55 (9th Cir. 2001), cert. denied, 535 U.S. 1112 (2002).

Finally, the fact that this matter is also pending in the federal district court does not make Board issuance of this decision inappropriate, particularly if it might assist the court.

The Scope of the ICCTA Preemption

The Commerce Clause of the Constitution (Art. 1, sec. 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. Gibbons v. Ogden, 9 Wheat 1, 196 (1824). One of the areas in which Congress has done so is with respect to railroads, in the Interstate Commerce Act (ICA), now codified in pertinent part at 49 U.S.C. 701-727 (general provisions) and 10101-11908 (rail provisions). The ICA is “among the most pervasive and comprehensive of federal regulatory schemes.”⁷ Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981); accord Deford v. Soo Line R.R., 867 F.2d 1080, 1088-91 (8th Cir. 1989) (ICA so pervasively occupies the field of railroad governance that it completely preempts state law claims).

⁷ Among its responsibilities under the ICA, the Board regulates the construction, acquisition, operation, and abandonment of rail lines (49 U.S.C. 10901-10907), railroad rates and service (49 U.S.C. 10701-10747, 11101-11124), and rail carrier consolidations, mergers, and common control arrangements (49 U.S.C. 11323-11327).

Although the ICA has long included a preemption clause, Congress further broadened the Act's express preemption in 1995. Section 10501(b) now expressly provides that "the jurisdiction of the Board over transportation by rail carriers" over any track that is part of the interstate rail network is "exclusive." And the term "transportation" is defined expansively in the ICA to embrace "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail" as well as "services relating to that movement." 49 U.S.C. 10102(9). Section 10501(b) also expressly provides that "the remedies provided [in 49 U.S.C. 10101-11908] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers" are "exclusive and preempt the remedies provided under Federal or State law." Thus, section 10501(b) does not leave room for state and local regulation of activities related to rail transportation, including routing matters.

As the courts have observed, "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that contained in section 10501(b). CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581-84 (N.D. Ga. 1996) (Georgia PSC). Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations. Friberg v. Kansas City S. Ry., 267 F.3d 439, 443 (5th Cir. 2001) (Friberg) (state statute restricting a train from blocking an intersection preempted, even though there is no Board regulation of that matter); City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (City of Auburn) (state and local environmental and land use regulation preempted); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000) (City of Marshfield) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted); Dakota, Minn. & E. R.R. v. State of South Dakota, 236 F. Supp.2d 989, 1005-08 (S. S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state "regulation" of railroads); Georgia PSC, 944 F. Supp. at 1573 (state regulation of a railroad's closing of its railroad agent locations preempted); Soo Line R.R. v. City of Minneapolis, 38 F. Supp.2d 1096 (D. Minn. 1998) (Soo) (local permitting regulation regarding the demolition of railroad buildings preempted); Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R., 265 F. Supp.2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (Austell) (local zoning and land use regulations preempted); Village of Ridgefield Park v. New York,

Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (Ridgefield Park) (complaints about rail operations under local nuisance law preempted).⁸

The cases cited above illustrate that Congress broadly divested states and localities of a regulatory role over rail transportation. By enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad's traffic should be routed.

The District contends that section 10501(b) only preempts direct "economic" regulation of railroads, and not a state or local measure aimed at protecting its residents. However, as the courts that have examined that provision have uniformly concluded, any notion that the statutory preemption in section 10501(b) is limited to direct state and local economic regulation is contrary to the broad language of the statute and unworkable in practice. *See, e.g., Friberg*, 267 F.3d at 443; *City of Marshfield*, 160 F. Supp.2d at 1014 (section 10501(b) is broad enough to "expressly preempt[] more than just those laws specifically designed to regulate rail transportation"). In *City of Auburn* the court found that state and local environmental and land use permitting was preempted. 154 F.3d at 1030-31. As that court explained, if local authorities had the power to impose "environmental" permitting regulations on the railroad, such power would in fact amount to "economic" regulation if the carrier could thereby be prevented from constructing, acquiring, operating, abandoning, or discontinuing a line. Thus, the scope of section 10501(b) is broader than just direct economic regulation of railroads.

The District suggests that the D.C. Act is not preempted because it does not totally bar the transportation of hazardous materials, but instead includes a process whereby a carrier can obtain a permit under certain circumstances and includes an exception in case of a temporary emergency elsewhere in the transportation system. However, the courts have made clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are preempted. *See, e.g., City of Auburn*, 154 F.3d at 1029-31; *Soo*; *Austell*; *Ridgefield Park*.⁹

⁸ *See also Union Pac. R.R.—Petition for Decl. Order*, STB Finance Docket No. 34090 (STB served Nov. 9, 2001) (City cannot unilaterally prevent a railroad from reactivating and operating over a line that the Board has not authorized for abandonment).

⁹ *See also N. San Diego County Transit Dev. Bd.—Petition for Decl. Order*, STB Finance Docket No. 34111 (STB served Aug. 21, 2002) (California Coastal Commission regulation of construction and operation of rail siding preempted); *Joint Pet. For Decl. Order—Boston & Maine Corp. & Town of Ayer, MA*, STB Finance Docket No. 33971 (STB served May 1, 2001), *aff'd*, *Boston & Maine Corp. v. Town of Ayer*, 206 F. Supp.2d 128 (D. Mass. 2002), *rev'd solely on attys' fee issue*, 330 F.3d 12 (1st Cir. 2003) (state and local permitting and environmental review of construction and operation of railroad intermodal facility preempted);
(continued...)

The D.C. Act's permitting regime is even more closely tied to actual movement of rail cars than those local permitting regimes that courts have already found to be preempted. Moreover, the District's view that the permitting provision demonstrates that the D.C. Act is not a burden on interstate commerce is at odds with the stated purpose in the enrolled bill as well as the statements of the D.C. Council members.

Of course, there are limits on the scope of section 10501(b), but they are inapplicable to the D.C. Act. For example, section 10501(b) preemption does not extend to operations that are not part of the national rail network. Thus, in Florida E. Coast R.R. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001), a case cited by the District, the court found that preemption did not extend to an aggregate distribution plant that was located on railroad property but was neither owned nor operated by a railroad and thus was not part of "railroad transportation" as broadly defined in the ICA. 266 F.3d at 1336.¹⁰ But here, CSXT is a railroad providing transportation services over the subject lines, which are an important part of the interstate rail network.

Moreover, although a literal reading of section 10501(b) might suggest that it supersedes other federal law, the Board and the courts have rejected such an interpretation as overbroad and unworkable. Instead, the Board and the courts have harmonized section 10501(b) with federal statutes, including FRSA. See, e.g., Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001) (Tyrrell).¹¹

Also, as the ICCTA legislative history makes clear, states may exercise their police powers reserved by the Constitution to the extent the use of the police power does not unreasonably interfere with rail transportation. H.R. Rep. No. 104-311 at 95-96, reprinted in 1995 U.S.C.C.A.N. 793, 807-08. Thus, courts have found it permissible for a state to maintain traditional regulation of roads and bridges so long as no unreasonable burden is imposed on a

⁹(...continued)

Borough of Riverdale—Pet. for Decl. Order—The New York Susquehanna & W. Ry., STB Finance Docket No. 33466, slip op. at 7-8 (STB served Sept. 10, 1999) (local zoning and land use constraints on the railroad's maintenance, use, or upgrading of its lines preempted).

¹⁰ See also High Tech Trans LLC—Pet. for Decl. Order—Hudson County, NJ, STB Finance Docket No. 34192 (STB served Nov. 20, 2002) (no preemption for activity that is not part of "rail transportation").

¹¹ See also Friends of the Aquifer et al., STB Finance Docket No. 33966, slip op. at 5-6 (STB served Aug. 15, 2001) (Congress did not intend to preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act, even though those statutory schemes are implemented in part by the states).

railroad¹² or to apply state and local requirements such as building and electrical codes as long as they do so without discrimination.¹³ But states or municipalities are not free to impose any requirements that they wish on a railroad in the name of police power. They cannot take an action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce.¹⁴ See, e.g., Friberg; City of Marshfield; Ridgefield Park. Regulating when and where particular products can be carried by rail, as the D.C. Act purports to do, would not have merely incidental effects on rail operations, as the District and Sierra Club suggest, but would constitute direct regulation of a railroad's activities.

Finally, contrary to the District's and the Sierra Club's claims, section 10501(b) applies even though other federal agencies have primary responsibility over rail safety and national security matters. As the comments of U.S. DOT underscore, Congress has vested aspects of national rail oversight in three different federal agencies: U.S. DOT (with primary jurisdiction over rail safety matters), DHS (for national security matters), and the Board (with broad general jurisdiction over railroad activities conducted over the interstate railroad network). The jurisdiction and regulatory responsibilities of the three federal bodies necessarily overlap to some degree, and, where they do, the federal bodies coordinate and cooperate with each other as appropriate. See Boston & Maine Corp. v. STB, 364 F.3d 318 (D.C. Cir. 2004); Tyrrell. But the reach of the Board's jurisdiction over rail transportation, and the preemption of state and local ability to regulate that transportation, is the same regardless of the commodity at issue. As U.S. DOT points out, the fact that the preemption contained in section 10501(b) overlaps with the preemptions contained in FRSA and HMTA does not lessen the preemptive effect of section 10501(b) or vice-versa. Tyrrell, 248 F.3d at 523 (both the Board and FRA have jurisdiction over railroad safety and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted).

¹² Iowa, Chicago & E. R.R. v. Washington County, IA, 384 F.3d 557, 561-62 (8th Cir. 2004)

¹³ Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp.2d 1186, 1189-90 (E.D. Wash. 2000).

¹⁴ Railroads are encouraged to work with localities to reach reasonable accommodations. See Ridgefield Park, 750 A.2d at 66 (while no permit can be required prior to construction, town can ask railroad to give it notice of the project and to furnish a site plan, and town may enforce such local non-transportation requirements as fire, plumbing and construction codes); Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (STB served Dec. 1, 2003) (carrier cannot invoke section 10501(b) preemption to avoid obligations under an agreement it had entered into voluntarily, where enforcement of the agreement would not unreasonably interfere with interstate commerce).

Section 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. The D.C. Act would unreasonably interfere with interstate commerce, and if permitted to exist, would likely lead to further piecemeal attempts by other localities to regulate rail shipments. See “Pittsburgh Eyes Hazmat Ban,” Traffic World at 29 (March 7, 2005) (reporting that Pittsburgh is considering adopting an ordinance similar to the D.C. Act should the D.C. Act be held lawful). However, in the Board’s view well-settled precedent demonstrates that the D.C. Act is preempted by 49 U.S.C. 10501(b).

It is ordered:

1. CSXT’s petition for a declaratory order is granted.
2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary